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No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1931

CONTINENTAL TIE AND LUMBER COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 15) is reported in 52 F. (2d) 1045.

JURISDICTION

The judgment sought to be reviewed was entered October 20, 1931. (R. 21.) The petition for certiorari was filed December 8, 1931, and the writ was granted February 15, 1932. (R. 22, 23.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a sum paid the petitioner as reimbursement of its railway-operating deficit for the period during which other railroads were under Federal control, pursuant to a certificate of the Interstate Commerce Commission issued under Section 204 of the Transportation Act, 1920, was taxable income.

2. Whether, if it was such income, it was taxable, as the Commissioner ruled, in 1920 when the Act was passed, rather than in 1923 when the certificate was issued.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 17–20.

STATEMENT

The petitioner filed a consolidated tax return for 1920 on the accrual basis, on behalf of itself and the Cimarron & Northwestern Railway Company, and during 1921 paid the tax so reported. (R. 12.) In considering and allowing a claim for refund of part of this tax, the Commissioner added to the consolidated 1920 income $27,228.35, thus reducing the refund paid. (R. 12.)

The amount of the tax paid as to $2,000 of the increase was decided by the Court of Claims to be due the petitioner as a refund, and the Government does not question that decision.

The rest of the increase made by the Commissioner to 1920 income, $25,228.35, was attributable

to an amount paid the Cimarron & Northwestern Railway Company in October, 1923, pursuant to a certificate of the Interstate Commerce Commission acting under Section 204 of the Transportation Act, 1920, which provided for the reimbursement of certain carriers for railway operating deficits during the period in which other railroads were under Federal control. (R. 12, 13.) No question is raised as to the correctness of the certificate. The petitioner's claim for refund of the tax was duly filed and rejected by the Commissioner. The Court of Claims allowed no recovery on account of this item.

SUMMARY OF ARGUMENT

The payment made under Section 204 of the Transportation Act, 1920, constituted income to the petitioner, a short-line railroad. The Government's moral obligation to make such reimbursement was generally recognized. Like the similar guaranty payments to the trunk lines under Section 209, discussed in No. 634, *The Texas & Pacific Railway Company* v. *United States*, these sums were intended as compensation to the carriers, and were not considered gratuities by Congress. To hold those amounts tax-exempt would place the carrier with a low operating revenue during the Federal control period in a better position than that occupied by the stronger short line which had no deficit. Congress intended no such anomalous result.

The payment under Section 204 was income for the year 1920. The petitioner's books were on the accrual basis. The obligation to pay the carrier became a legal liability upon the passage of the Act in 1920. The petitioner, under the practice of the Bureau of Internal Revenue, should have accrued the gross amount less estimated deductions during 1920 when it was requested by the Interstate Commerce Commission to file a report of its deficit. The fact that the Commission was required to calculate the exact amount of these deductions is not significant since the liability was already certain. It was possible for short lines, like the petitioner's, to secure payment under Section 204 during the year 1920 by filing their reports promptly. That the reimbursement in the instant case was not certified by the Commission until after 1920 was due to the tardy action of the petitioner.

ARGUMENT

This case follows No. 634, *The Texas & Pacific Railway Company* v. *United States*, a similar case, but one where the payments were made under Section 209 of the Transportation Act, 1920. As much of the argument by the Government in No. 634 is applicable also to the instant case, we respectfully refer the Court to our Brief in that case, and to avoid repetition present in this Brief only certain additional discussion which, not pertinent to No. 634 is of importance in the instant case.

I

THE PAYMENT CONSTITUTED INCOME TO THE PETITIONER

Section 204 of the Transportation Act, 1920 (*infra* p. 17), provided for compensation to certain short lines, which while under private operation had suffered loss because other roads were under Federal control. In effect railroads which had not been under Federal control during the entire period were to be paid the difference between the average pro-rata earnings during the interval of Federal control when the particular road was under private management, and the average earnings during three years next prior to the Federal control period. This latter period is called the "test period." The difference is designated in Section 204 (a) as a "deficit." This has been interpreted to mean the difference between the earnings during the Federal control period and the average earnings of the "test period." *Construction of the word "Deficit,"* 66 I. C. C. 765.

The lines referred to in Section 204 suffered by the Government regulation of trunk roads with which they connected, and by the routing of freight over competing through lines which were under Federal control. The Federal Control Act of 1918, c. 25, 40 Stat. 451, did not provide for compensation to such short lines which were not taken over by the Government. *Marion & Rye Valley Railway Company* v. *United States,* 60 C. Cls. 230, 253, affirmed, 270 U. S. 280. The petitioner was under Federal control for six months and has been fully compen-

sated for that use of its road. (R. 12.) Under Section 204 of the 1920 Act it received a further payment which was intended to supplement the compensation received by it under the Federal Control Act. This purpose was recognized by the court below when it stated (R. 19):

> the specific purpose of the section was to reimburse such railways on account of deficits in their net railway operating income. The legislative history shows that it was the intention of Congress to extend certain aid to railways not under Federal control consisting largely of so-called short lines, in recognition not only of their financial necessities but of injury to them through Federal control and operation of lines with which they connected or competed during the Federal control period.

That the Government's liability to reimburse the short lines was generally recognized is indicated by the following quotation from the 1924 Report of the Director General of Railroads, pages 36, 37:

> It was quite evident that there was an ultimate liability of some sort to these short lines on the part of the Government for the entire period of Federal control, and that this liability must be liquidated either by the Interstate Commerce Commission, under the provisions of the deficit section (204, transportation act), or the Railroad Administration, on the theory that these properties were at least under nominal Federal control for the first six months of that period.

It is evident from the phraseology of Section 204 that Congress was not contemplating a gratuity in the sense of a gift unsupported by any obligation. The title of Section 204 "Reimbursement of Deficits during Federal Control" and the characterization in Section 212 (Act of February 26, 1921, c. 72, 41 Stat. 1145, U. S. C., Title 49, Sec. 79) of the payments under Section 204 as reimbursements to carriers indicate that Congress intended payment of compensation and satisfaction of a moral obligation, rather than a gift.

Moreover, the nontaxability of these payments under Section 204 would be inconsistent with the purpose of the statute. Congress desired to restore the competitive balance of the railroads which had existed prior to Federal control. It sought to strengthen the carriers which had been injured by Federal control so that they would be placed in the same relative position they had occupied prior to Federal control. There was no purpose to place the weaker roads which Congress was reimbursing in a better position than the stronger short lines which received no payment under Section 204. Yet that is what would happen if these payments should be held tax exempt.

Thus, assume that short-line carrier "A" during Federal control earned $200,000, and that the operation of short-line "B," similarly placed, resulted in larger earnings of $500,000. Both roads during the test period had an income of $500,000. Road "B" will, of course, be taxed upon its $500,000 oper-

ating revenue. Road "A" will receive a Government payment of $300,000 tax-free and as a result be better situated financially than its competitor. Such an unreasonable result was not intended by Congress in passing Section 204. To hold the payments taxable income would result in no such unfair discrimination in favor of the weaker roads.

At all times the Treasury Department has held that payments under Section 204 of the Transportation Act were taxable income. The Commissioner first ruled that they were income for the taxable year in which the deficit was sustained. I. T. 1326, I–1, C. B., 91. This was changed by S. M. 4236, IV–2, C. B. 149, in which the question was considered at length and such payments held to be income for 1920, the year in which the right to the reimbursement arose.

II

THE PAYMENT WAS INCOME FOR THE YEAR 1920

The petitioner contends that even if the payment of the operating deficit under the provisions of Section 204 of the Transportation Act was taxable income to the railroad, nevertheless it should be taxed in the year 1923 when the Interstate Commerce Commission determined the amount due and certified it to the Treasury for payment. The Cimarron and Northwestern Railway kept its books on the accrued basis. (R. 15.)

Section 204 created an obligation on the part of the Government to reimburse the so-called short line railroads for their operating deficit during the

period of Federal control. The liability of the Government to pay was unqualified. The method of computation of the amount of reimbursement was detailed in the Act. In general the Act directs the Interstate Commerce Commission to ascertain the amount of reimbursement by a comparison of the operating revenue of the railroad for the period of Federal control with its corresponding average revenue during the test period which preceded Federal control. The actual calculation and comparison of the income for these two periods predicated upon reports from the railroads was left to the Commission. See *Great Northern Railway Co.* v. *United States,* 277 U. S. 172, 180.

Upon the passage of the Act payment was certain. The maximum limit of reimbursement was definitely fixed by the terms of the statute. The railroad could have ascertained its gross claim with accuracy from its own books while awaiting the decision of the Interstate Commerce Commission. The payment of this was assured, after deductions in the reconciliation of the revenue during the two periods had been made.

The positive assurance of the payment of the deficit to it upon the passage of the Transportation Act, 1920, resulted in the accrual at that time of the amount ultimately received. Certainly the taxpayer by the end of 1920 could have accrued the gross amount reported less estimated deductions and then have corrected those deductions by an amended return after the Commission's determina-

tion. Such procedure was authorized by the Commissioner of Internal Revenue. See S. M. 2970, IV–1 C. B. 127. The statute fixed liability and all that remained to be determined after the passage of the Act was the amount of the difference of operating costs and expenses based on the past facts within the knowledge of the carrier. In *Commissioner* v. *Old Dominion S. S. Company,* 47 F. (2d) 148 (C. C. A. 2d), it was held in a similar case that payments under the Federal Control Act of the excess over the standard return due the carrier accrued prior to payment.

Although there was vested in the Interstate Commerce Commission some latitude in the determination of the deficit as defined in the statute, the Commission was bound to adjust the accounts and ascertain the amount of reimbursement under settled principles of railway accounting. Although the amount was not liquidated until the Commission finally certified the sum payable, there was no litigation or dispute as to the right of recovery. See *Lucas* v. *American Code Co.,* 280 U. S. 445, where the accrual of a loss prior to the date on which *liability* was certain was denied. Moreover in the instant case the approximate amount of the payment was predictable and the maximum limit was definitely ascertainable.

It was possible for the Cimarron & Northwestern Railway Company to have accelerated the consideration of its claim by the Commission so as to have received the reimbursement during the year 1920. For example, the Little Cottonwood Trans-

portation Company by filing its return promptly instead of delaying until 1922, as was done in the instant case, received its payment under Section 204 in 1920. *Little Cottonwood Transportation Co.*, 65 I. C. C. 189. The despatch with which the Commission acted in these cases once the carrier's report was filed is indicated by this last cited matter. The Little Cottonwood Transportation Company, in response to the Commission's circular of March 4, 1920, filed its return promptly. The case was submitted to the Commission on July 6, 1920, and decided on September 18, 1920, when the certificate to the Secretary of the Treasury was issued.

In *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, this Court held that the invested capital of a corporate taxpayer on an accrual basis should be reduced in its return for 1919 by the amount of 1918 taxes, although those taxes were not ascertainable until February 24, 1919, when the Revenue Act of 1918 was passed. In determining such questions of accrual, the important fact to be ascertained is the date on which liability concededly becomes fixed.

The rule of the *Fawcus Machine Company* case in approving the validity of Article 845 of Treasury Regulations 45 (providing that "federal income taxes are deemed to have been paid out of net income of the taxable year for which they are levied") is equally applicable to cases in which excess profits taxes for the year 1918 are assessed under the provisions relative to special assessments.

(Secs. 327–328, Revenue Act of 1918, c. 18, 40 Stat. 1057, 1093.) The Bureau of Internal Revenue has consistently construed this section of the regulations as accomplishing this result. Under the special assessment provisions there is vested in the Commissioner of Internal Revenue a discretion in the computation of excess profits taxes that is not judicially reviewable. *Williamsport Wire Rope Company* v. *United States,* 277 U. S. 551, *Duquesne Steel Foundry Co.* v. *Commissioner,* 283 U. S. 799. There is thus added to the retroactive application, as of December 31, 1918, of the Revenue Act of 1918, enacted February 24, 1919, the discretionary administrative decision of the Commissioner in the computation of the taxes. Such a variation of facts of the *Fawcus Machine Company* case would involve the accrual of items later computed under a law passed after the date of accrual and under as broad a discretion in the Commissioner of Internal Revenue as is vested in the Interstate Commerce Commission in the instant case.

That subsequent calculation is necessary to determine the exact amount of the income, or loss, is not significant. That the amount of the payment due under Section 204 had not been definitely ascertained in the instant case during the year 1920 does not prevent the accrual of the reimbursement during that year. It was conceded by the Government that there was an amount due. The maximum payment could be ascertained by the railroad itself. The possibility of a reduction from the maximum

does not render the amount so uncertain as to prevent its being accrued. As the petitioner kept its books on the accrual basis it was necessary that this be done in order clearly to reflect its income for 1920.

The Commissioner of Internal Revenue has consistently held that payments under Section 204 can not be accrued later than the year 1920. S. M. 4236, IV–2 C. B. 149. The Board of Tax Appeals in similar cases arising under Section 209 has consistently held that guaranty payments made under the Transportation Act, 1920, are taxable as 1920 income although in some of those cases the payments were not certified by the Interstate Commerce Commission until several years after 1920. *Galveston Wharf Company* v. *Commissioner,* 22 B. T. A. 1312. In the instant case the Court of Claims held that such accrual in 1920 was necessary in order to reflect the taxpayer's true income for that year. The court stated (R. 20–21):

> The right to receipt accrued upon the termination of Federal control on March 1, 1920. All that remained to be done was to compute the deficit in accordance with the provisions of the act. The accrual system of accounting, as it has always been applied, requires time for computation and adjustment. The plaintiff had previous knowledge and experience as to the test period whereby the railway-operating income and deficit were to be measured and the transportation act was enacted in ample time for the necessary computations to have been made or reason-

> ably estimated for the purpose of accrual in 1920. No contention is made as to any question of dispute or difference between the parties which might have made an estimate or accrual of the claim of the Cimarron and Northwestern Railway Company impossible. There appears to have been no substantial dispute between the plaintiff and the Interstate Commerce Commission as to its claim. The authority of the commission consisted in a review and audit of plaintiff's books for the purpose of determining its operating deficit as compared with similar accounts during the test period. It is true that there was considerable delay in the payment of plaintiff's claim but that was due to the failure of plaintiff to report or to submit a complete statement of facts and full information to the commission in response to the circular issued by it.

Petitioner urges that it had no enforceable claim against the United States in 1920 under Section 204. But the Government's liability to pay the actual deficit to the railroad was admitted upon the passage of the Transportation Act. The delay in the instant case beyond the year 1920 was obviously due to the tardy submission of the report by the road to the Commission on November 3, 1922. (R. 13.) The actual time of consideration by the Commission of the claim was from August 9, 1923, until October 13, 1923, slightly more than two months. *Cimarron and Northwestern Railway Company,* 82 I. C. C. 441. Although there was no

enforceable claim in the sense that it might be enforced in court prior to the Commission's certification, there was a statutory right to reimbursement and an easy method of securing such reimbursement within the year 1920.

The petitioner points to the provision in Section 204 (b) that the deficit should be computed in a manner similar to that provided in Section 209, and makes elaborate comparisons with the requests for information and promulgation of rules by the Commission after the year 1920, in order to suggest that events after 1920 formed a basis for the Commission's determination. But these analogies are not controlling. The Commission actually determined and certified a payment of $1,311,700.63 under Section 209 as early as January 29, 1921, long prior to the issuance of the last regulation concerning the computation of reimbursement under Section 209 to which the petitioner directs this Court's attention. *Norfolk Southern Railroad Co.*, 65 I. C. C. 798. Furthermore, these subsequent regulations and the Act of February 26, 1921, c. 72, 41 Stat. 1145 (U. S. C., Title 49, Sec. 79), although applicable to any later consideration by the Commission of claims under Section 209, had no reference to the ascertainment of amounts due under Section 204, such as is involved in the instant case. We are advised that the Interstate Commerce Commission issued no further general instructions to carriers having claims under Section 204 after March 4, 1920, when, pursuant to the order of the Commis-

sion of that date a circular was issued containing a form for "Return under Section 204 of the Transportation Act, 1920." This was forwarded to all carriers subject to the provisions of that Act shortly after March 4, 1920. It is found as a fact that the notice was sent to the Cimarron and Northwestern Railway Company. (R. 13.)

The petitioner further argues that certificates of amounts due under Section 204 were conditional upon the acceptance by the carrier of the amount so certified. Although the form of the certificate did contain such acceptance there was no requirement either of statute or regulation that claimants under Section 204 were required to accept the determination of the Commission. An acceptance was required by all carriers seeking relief under the provisions of Section 209, but Congress unconditionally granted the reimbursement to all carriers within the provisions of Section 204.

CONCLUSION

The decision below is correct. There is no authority to the contrary. The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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APRIL, 1932.

APPENDIX

STATUTES INVOLVED

Section 213 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065, provides in part:

> SEC. 213. That for the purpose of this title (except as otherwise provided in section 233) the term "gross income"—
>
> * * * * *
>
> (b) Does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * *
>
> (3) The value of property acquired by gift
>
> * * * * *

Section 204 of the Transportation Act, 1920, c. 91, 41 Stat. 456, 460, U. S. C. Title 49, Section 73, provides:

> SEC. 204. (a) When used in this section—
>
> The term "carrier" means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

The term "test period" means the three years ending June 30, 1917.

(b) For the purposes of this section—

Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called "Federal control return"), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called "test period return"): *Provided,* That "test period return," in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was

not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) For every such month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is

hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 560.—October Term, 1931.

Continental Tie and Lumber Company, Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[May 16, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

For the year 1920 the petitioner filed a consolidated income tax return for itself and the Cimarron and Northwestern Railway Company and paid the tax shown as due. Subsequently a claim for refund was prosecuted, whereupon the Commissioner made a reaudit and added to the railway's income some $27,000. The refund granted was diminished by the amount of the additional tax resulting from the increase in income so determined. The petitioner objected to this reduction and brought suit in the Court of Claims to recover the full amount claimed to be refundable. The railway company is a short-line carrier whose road was in possession and control of the United States and operated by the Director General of Railroads from December 28, 1917, to June 3, 1918, when it was relinquished, and thereafter throughout the remainder of the period of federal control operated by its owner. Approximately $25,000 of the additional income determined by the Commissioner consisted of a payment to the railway pursuant to an award of the Interstate Commerce Commission under the terms of § 204 of the Transportation Act, 1920.[1] This section provided for such an award and payment to a railroad which during any part of the period of federal control competed for traffic, or connected, with one under federal control, and sustained a deficit in operating income for that portion of the period during which it operated its own railroad. The act directed the Commission to compare the results of such operation with those of

[1]Ch. 91, 41 Stat. 456, 460.

the test period, defined as the three years ending June 30, 1917; and if less favorable during the period of federal control than during the test period, to award an amount calculated as prescribed by the section. The Commission made an award and the Secretary of the Treasury paid the railway.

The petitioner asserted (1) that the sum received was not income within the intent of the Sixteenth Amendment or § 213 of the Revenue Act of 1918; (2) that if income, it was not taxable for 1920, as held by the Commissioner, but for 1923, the year in which the amount was determined and paid. The Court of Claims denied recovery.

What we have said in *Texas & Pacific Railway Company* v. *United States,* No. 634, decided this day, is determinative of the first contention. Section 209 of the Transportation Act guaranteed the payment of any deficiency below a fixed minimum of operating income for the six months ensuing the termination of federal control to railroads which had been taken over by the United States. By the terms of § 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within § 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by Government operation of the larger railroad systems. The Transportation Act did not contemplate that the payments to be made pursuant to § 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where actual deficits in income had resulted. For the reasons set forth in No. 634 we hold that these payments were not subsidies or bonuses, but were income within the intent of the Amendment and the statute.

The petitioner kept its accounts upon the accrual basis. The Government insists, and the Court of Claims held, that the right to payment having ripened in 1920 the taxpayer should have re-

turned the estimated award under § 204 as income for that year. The petitioner replies that a determination whether it would receive any award under the section and, if so, the amount of it depended on so many contingencies that no reasonable estimate could have been made in 1920, and that the sum ultimately ascertained should be deemed income for 1923, the year of the award and payment.

The Transportation Act took effect on February 28, 1920. On June 10 the Interstate Commerce Commission issued general instructions governing the compilation and submission of data by carriers entitled to awards under § 204. The petitioner correctly states that at the date of the Act's adoption no railroad had a vested right in any amount; until the Commission made an award nothing could be paid, no proceeding was available to compel an allowance, or to determine the elements which should enter into the calculation. In short, says the petitioner, the carrier had no rights, but was dependent solely upon the Commission's exercise of an unrestrained discretion, and until an award was made nothing accrued. But we think that the function of the Commission under the act was ministerial, to ascertain the facts with respect to the carrier's operating income by a comparison of the experience during the test period with that during the term of federal control. The right to the award was fixed by the passage of the Transportation Act. What remained was mere administrative procedure to ascertain the amount to be paid. Petitioner's right to payment ripened when the act became law. What sum of money that right represented is, of course, a different matter.

The petitioner says that at the date of the passage of the act it was impossible to predict that any award would be made to the railway, and, assuming one would eventuate, its amount could not be estimated, for the reason that the principles upon which awards were to be made had to be settled by the Commission and were not finally formulated until 1923. The Government insists that while adjustments or settlement of principles by the Commission might vary the amount to be awarded, the petitioner's case presented problems not differing from those confronting many business concerns which keep accounts on an accrual basis and have to estimate for the tax year the amount to be received on transactions undoubtedly allocable to such year. Admitting there might be differences and discrepancies between the railway's estimate

and the amount awarded by the Commission, these, says the Government, could, as in similar cases, have been adjusted by an additional assessment or a claim for refund after final determination of the amount due.

The case does not fall within the principle that where the liability is undetermined in the tax year the taxpayer is not called upon to accrue any sum (*Lucas* v. *American Code Co.*, 280 U. S. 445), but presents the problem whether the taxpayer had in its own books and accounts data to which it could apply the calculations required by the statute and ascertain the *quantum* of the award within reasonable limits.

The carriers kept their accounts according to standards prescribed by the Commission; and these necessarily were the source of information requisite for ascertainment of the results of operation in the two periods to be compared. In the calculation for two such brief periods allowance had to be made for the fact that certain operating charges entered in the books would not accurately reflect true income. Such, for instance, were maintenance charges and those to reserve accounts. The enormous increase in labor and material costs after the expiration of the test period had also to be considered in comparing charges for costs of repairs and renewals in the two periods. Section 204 incorporated by reference the terms of § 209 applicable to the method of treating such items, and the latter in turn referred to the relevant provisions of § 5 (a) of the standard operating contract between the Director General and the various railroads. As might have been expected, the general principles thus formulated did not cover in detail questions of fact, the solution of which required in some degree the exercise of opinion and judgment. Thus difference might fairly arise as to when reserve accounts ought to be closed out, as to how much of the sum actually expended for maintenance within a given time was properly allocable to that period, and how much to later years; at what price renewals and replacements should be charged in view of the rapidly mounting cost of material; what factor of difference should be allowed for the efficiency of labor in the pre-war and post-war periods. The petitioner points to the fact that these questions were raised by the railroads under § 209, that the Commission gave extended consideration to them, and that, as respects sundry of them, the applicable principles were not settled until 1921, 1922 and 1923. Petitioner might have added that the Commission, while

attempting as far as possible to formulate general principles applicable to large groups of carriers, found it necessary in addition to consider the peculiar conditions and special circumstances affecting individual carriers in order in each case to do justice to the carrier and to the United States.[2] But in spite of these inherent difficulties we think it was possible for a carrier to ascertain with reasonable accuracy the amount of the award to be paid by the Government. Subsequent to its order of June 10, 1920, the Commission made no amendment or alteration of the rules with respect to the information to be furnished under § 204. Obviously the data had to be obtained from the railway's books and accounts and from entries therein all made prior to March 1, 1920. These accounts contained all the information that could ever be available touching relevant expenditures. Compare *United States* v. *Anderson*, 269 U. S. 422. The petitioner was promptly informed by the terms of § 209 as supplemented by the instructions issued by the Commission of the method to be followed in allocating charges to operation during periods under inquiry. It does not appear that a proper effort would not have obtained a result approximately in accord with what the Commission ultimately found.

Much is made by the petitioner of the fact that as a result of representations by the carriers the Commission from time to time during 1921, 1922 and 1923 promulgated rulings respecting the method of adjusting book charges to actual experience, and it is asserted that petitioner could not in 1920 have known what these rulings were to be. But it is not clear that if the taxpayer had acted promptly an award could not have been made during 1920, or at least the principles upon which the Commission would adjust the railway's accounts to reflect true income have been settled during that year, sufficiently to enable the railway to ascertain with reasonable accuracy the amount of the probable award. The reports of the Interstate Commerce Commission show that it was possible for a carrier whose claim arose under § 209 to obtain a final award early in 1921, prior to the time for preparing its income tax return.[3] From the record it would seem that in spite of the fact that its return was not made until November, 1922, the petitioner made up its claim by taking maintenance charges

[2] *Maintenance Expenses under Section 209*, 70 I. C. C. 115.
[3] *Norfolk Southern R. R. Co.*, 65 I. C. C. 798.

as appearing in its books without attempt at allocation as between the limited periods in which they were entered and the probable useful life of the installations. Petitioner must have known that the entire amounts charged to maintenance during the respective periods would not be properly allowable in ascertaining true income for each period. The books and accounts fixed the maximum amount of any probable award, and if petitioner had endeavored to make reasonable adjustments of book figures it could have arrived at a figure to be accrued for the year 1920. Any necessary adjustment of its tax could readily have been accomplished by an amended return, claim for refund, or additional assessment, as the final award of the Commission might warrant.

For these reasons the Court of Claims correctly held that the amount awarded was taxable income for the year 1920.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.